No. 13802

In the United States Court of Appeals for the Ninth Circuit

BOEING AIRPLANE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION FOR REVIEW AND REQUEST FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

SUPPLEMENTAL BRIEF OF THE NATIONAL LABOR RELATIONS BOARD IN ANSWER TO BRIEF OF INTERVENORS

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This supplemental brief is submitted in answer to the brief filed by the intervenors.

Intervenors are Joseph A. Pepin and Peter P. Pioli. The complaint issued by the General Counsel of the Board alleged that the intervenors were discriminated against by the Company (R. 14, 16). The Board dismissed the complaint with respect to the intervenors, finding that the allegations of discrimination were unsupported by a preponderance of the evidence (R. 163–165, 217 (Pepin); R. 69–71, 199 (Pioli)). Invoking the jurisdiction of this Court to review at the instance of an aggrieved person a final order of the Board denying the relief sought (Sec. 10 (f) of the Act; *Albrecht* v. *N. L. R. B.*, 181 F. 2d 652, 653–655 (C. A. 7)), intervenors petitioned this Court to

set aside the order of dismissal as without substantial support in the evidence and to "grant these petitioners relief * * *" (R. 4473, 4470–4474).

The question presented is whether, considering the evidence as a whole, the Board reasonably concluded that there was a failure of proof with respect to the intervenors. More precisely, since the Board found that the evidence did not preponderate in favor of a finding of discrimination and since the relief requested by petitioners requires such finding, the question is whether the evidence is so compelling that there is no reasonable alternative to finding that intervenors were discriminated against. In other words, if the trial were to a jury, the trial judge would be required to direct a verdict in intervenors' favor.

We now show that intervenors have not sustained the burden of establishing that the evidence compelled a finding in their favor.

1. Joseph A. Pepin

On October 28, 1949, employee Pepin, a timekeeper, was "laid off for lack of work" (R. 1784–1785), in conjunction with the layoff of 10 or 12 others in his job classification occasioned by "a surplus of timekeepers in or about that period" (R. 2702–2703, 2707–2708). The decision to lay off Pepin was made by Lynn Morrell, the chief timekeeper (R. 2708). The implied basis for Pepin's selection for layoff, as testified to by Morrell, was his uncooperative attitude in discharging his job obligations. As explained by Morrell (R. 2706):

> That was his attitude all the way along. His whole attitude was that he knew just how far he could go, and he was going to go to the limit; there was never enough to get enough evidence against him to make a full week on him, you might say—but continually just going up to the borderline, and then antagonizing, and then stopping.

Three instances of actual dereliction on Pepin's part, occurring before the strike, were testified to by Morrell: (1) Pepin abused an overtime privilege extended timekeepers; timekeepers were asked to report six minutes before the regular reporting time in order to assist new employees in clocking in, and if they reported only four minutes earlier, they would nevertheless be paid for the full six minutes; Pepin would report for less than the full six minutes, thereby "not going into the spirit of the order of the overtime in working a full 6 minutes" (R. 2705–2706, 4441–4446); (2) Pepin was apprehended by a guard in the mail room going through the mail, an act for which Pepin was disciplined by a two week suspension (R. 2704–2705, 2708–2710; Pepin "was caught playing poker down in the tunnel with some other employees" and reprimanded for it (R. 2704, 2709).

The examiner credited "the testimony of Lynn Morrell concerning the layoff of Joseph Pepin" (R. 217). Acceptance of this testimony obviously provides a nondiscriminatory basis for Pepin's selection for layoff when a surplus of personnel required a reduction in force among the timekeepers. Intervenors' brief attempts therefore to show that this testimony is unworthy of credence.

To this end, emphasis is placed on the fact that the three acts of misconduct occurred before the strike, and therefore at a time well before the layoff. This might be significant if these acts were advanced as the reason for the layoff; but they were actually cited as illustrative of a continuing attitude and the layoff was ascribed to the attitude, not the particular acts. Furthermore, in describing the attitude, Morrell stated that the gist of its undesirability was that Pepin would not do more than just enough to get by without actually overstepping—"There was never enough to get enough evidence against him * * * but continually just going up to the borderline * * * and then stopping." If the witness was sincere in this evaluation of the attitude, as the examiner found Morrell to be, it is patently not enough to undo this credibility determination to show there was a paucity of actual acts of misconduct and that these occurred before the strike. This was consistent with the attitude described.

In a further attempt to show that Morrell is not to be believed, intervenors contend in effect that he exaggerated the incidents of misconduct. To the extent that this assertion rests on conflicts in the testimony of Morrell and Pepin,[1] there is obviously no way to determine on the cold record which of the two was exaggerating and which minimizing. The examiner's credibility determination cannot be impeached on this basis. We turn therefore to the other evidence. As to the abuse of the overtime privilege, the documen-

[1] The testimony of Morrell appears at R. 2702–2712, 4441–4445, that of Pepin at R. 1781–1795, 4082–4107.

tary evidence shows that for the 44 working days before this privilege was removed from Pepin because of abuse, Pepin clocked in no earlier than four minutes before reporting time on five occasions and no earlier than three minutes before reporting time on six occasions. This incidence of uncooperativeness could well be vexing to management. As to poker playing, two witnesses testified that Pepin did play with them and that they had all been reprimanded for it, but contrary to Morrell's statement (R. 2704), they denied that they had overstayed the lunch period in the process (R. 4373–4377). There was thus confirmation of Morrell's testimony that poker playing was a reprimandable offense but disagreement as to whether the offense extended to playing on working time. The examiner could well have concluded either (1) that this was an insignificant tangential contradiction attributable to imperfectness of memory rather than to insincerity and that it had no bearing on the essential truth of Morrell's testimony, or (2) that Morrell was to be believed and the two witnesses disbelieved. In either event the question was within the examiner's province as the observer of the witnesses to resolve. Finally, as to the mail room incident, the two witnesses relied upon to discredit Morrell confirm rather than contradict his testimony (R. 4391–4394, 4396–4402). Any differences in the testimony were not serious; none professed to remember the incident with exactitude; as one of the witnesses repeatedly explained, "I have been away from it for a long time" (R. 4402, 4397, 4399, 4400).

Intervenors have thus advanced no grounds adequate to undo the examiner's determination that Morrell testified truthfully concerning the reason for Pepin's layoff. More fundamentally, however, they have been unable to establish affirmatively any connection between Pepin's union activity and his layoff. Intervenors stress Pepin's prominence in IAM union activity. But prominent union activity standing alone is not evidence that a discharge is discriminatory. To bridge the gap, intervenors rely on Pepin's testimony to the effect that Kelby De Priest, a Teamsters organizer, told Pepin that no matter whether the IAM or Teamsters won the election, "I will bet you $10.00 you won't be here in six weeks" (R. 1786–1787; Int. Br., pp. 5, 7). To the extent that De Priest's statement professes to be an expression of management's attitude, the evidence is hearsay, and since the statement it reports is not attributed to a person shown to be an agent of the Company authorized to deal with employment, it is not within the exception to the hearsay rule and is therefore incompetent.[2] In addition, intervenors rely (Br., pp. 5–6) on Morrell's warning to Pepin on October 22, 1948, upon the latter's return to work at the end of the IAM strike, that he "could not engage in any union activities, and the least infraction would mean my dismissal instantly" (R. 1791, 1793). Without doubt this warning was illegal (Bd.'s main brief, pp. 45–47), but there was no evi-

[2] The situation is thus quite different from that discussed at pp. 36–37 of the Board's main brief.

dence to connect this warning with the layoff which did not occur until one year later.

Finally, intervenors strongly claim (Br., pp. 3-4, 14–16) that the Board's acceptance of the examiner's crediting of Morrell's explanation of the reason for Pepin's layoff cannot stand consistently with the Board's rejection of the examiner's crediting of Morrell's explanation of the reason for Gerber's discharge. But as we explained in our main brief (pp. 58-61), the heart of Morrell's testimony with respect to Gerber was flatly contradicted by the Company's own records and by admissions of the Company's assistant labor relations manager, an inconsistency which observation of demeanor was incapable of resolving in favor of Morrell's credence insofar as his testimony concerned Gerber. Thus, Morrell's testimony with respect to Gerber was "in conflict with contemporaneous documents" and therefore could be given "little weight. * * *" *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 396. No comparable basis exists for discrediting Morrell's testimony with respect to Pepin. Intervenors' claim reduces therefore to the assertion that if Morrell was unreliable on one issue he could not be believed on any. It suffices to say, in the words of Judge Learned Hand, "It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all." *N. L. R. B.* v. *Universal Camera Corp.*, 179 F. 2d 749, 754 (C. A. 2), reversed on other grounds, 340 U. S. 474.

2. Peter P. Pioli

With respect to employee Pioli, the intervenors accept the underlying findings of fact pertinent to his discharge but contend that these facts were wrongly interpreted and that the only correct conclusion based on them is that Pioli was discriminatorily discharged. The findings of the examiner, adopted by the Board, with respect to Pioli are as follows (R. 69–70):

> Peter Pioli, a tool and die maker, was first employed by Respondent in 1938. For many years Pioli occupied a prominent position in Lodge 751 and during the strike was assistant to one of its business agents and in charge of the picket line. At other times Pioli was a district councilman and district vice president, and at the time of the hearing was serving his fifth term as president of a subsidiary local in the Lodge. Pioli, of course, was a striker and returned to work on October 8, 1948. On November 11 he obtained a permit to go to shop 102 to check on some material, returned to his own shop and then again went to 102 to have a press plane sheared. Upon his return he learned that Assistant Superintendent Hyman had accused him of engaging in union activity during his visit to 102. Pioli approached Hyman and told him that he had gone to 102 on Respondent's business. Hyman, according to Pioli, said "God damn you, Pioli, you know God damn well you were down there in 102 organizing." Pioli answered, "Hyman you are a damn liar. That is something you are going

> to have to prove." Hyman retorted, "I don't have to prove anything. Right now they will take my word for it and you are as good as out." Pioli shortly thereafter appeared before a factory review board and although he told the board that Hyman was the first to use intemperate language was nevertheless terminated.

The conclusion of the examiner, adopted by the Board, based on this incident, is as follows (R. 139):

> Respondent was of course aware of Pioli's prominent position in Lodge 751 and of his activity during the strike. Hyman's suspicion that Pioli was absent from his department on union business, though mistaken, was not entirely unreasonable. I find that Hyman profanely accused Pioli of organizing in Department 102 and that Pioli called Hyman a damned liar. I suppose that the discharge which followed could have been the planned result of a contrived situation but I do not believe that the evidence supports such a finding. I will recommend that the complaint as to Pioli be dismissed.

The incident is susceptible either to the interpretation that Pioli was discharged for calling his supervisor "a damned liar" or that the name-calling was utilized as a pretext to conceal antiunion motivation underlying the discharge. Since either interpretation is fairly open, the inference reasonably drawn by the trier of fact must stand. *Radio Officers v. N. L. R. B.*, 22 U. S. Law Week 4097, 4105-4106 (U. S. Sup. Ct., Feb. 1, 1954).

CONCLUSION

Intervenors have been unable to establish that the evidence supporting their claim is so cogent that there is no reasonable alternative to finding that they were discriminated against. It is therefore respectfully submitted that their petition be denied.

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